

## ***CHAPTER 3***

### ***PROPOSED CONTENTS AND FEATURES***

#### ***OF A REGIONAL ARRANGEMENT***

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The review in the previous chapter of existing paperless trade arrangements clearly shows that the successful creation of a cross-border paperless trading environment in any country requires strong political will, administrative leadership in managing such a changeover and effective participation by traders, in addition to the creation of a suitable legal framework and the marshalling of necessary technological, human and financial resources.

If all these favorable factors are present within a country it may not need outside impetus to proceed in the direction of paperless trade. However, in the absence of a national initiative, a multilateral agreement can act as a catalyst for individual nations to create a paperless trading environment, as is shown in one such subregional case of ASEAN Single Window. However, a global agreement may take considerable time to establish and may not emerge in the near future, either in WTO or WCO. Hence, the best way forward for the Asia-Pacific region at present appears to establishing a Regional Arrangement/Agreement that can serve the countries of the region.

ESCAP members could also decide to keep the arrangement open to non-regional members. In fact, as Asia-Pacific countries have FTAs with countries in other regions, it may be advisable to keep such an arrangement open to non-regional members. This will have the advantage of making it compatible with similar arrangements, provided that international standards and protocols are used in creating the legal and technological frameworks under the proposed Regional Arrangement for Cross-Border Paperless Trade.

This study has benefited from a review of a number of papers detailing approaches to paperless trade, as discussed in chapter 2. It appears logical to suggest that a country should first re-engineer and simplify its existing business processes, carry out data harmonization and establish a national Single Window system before embarking upon cross-border paperless exchanges of trade-related data and documents. Most of the success stories have followed that route. However, some countries have already put in place automated systems that are not Single Window systems, and they need flexibility to implement cross-border paperless data exchanges, which now appears to be technologically feasible as discussed below. Further flexibility is also required in determining the data elements to be exchanged. With such flexibility, the proposed Regional Arrangement will have wider acceptability. Moreover, once the user countries see the practical benefits to be derived from cross-border paperless exchanges of trade-related data, and with a legal framework in place, it would perhaps be easier to achieve data harmonization and the establishment of national Single Windows in place of existing automated systems. The model suggested in this study, therefore, appears to be a practical way of enabling more countries to participate in a regional cross-border paperless trade arrangement.

Taking into account these general observations, the parameters of a workable Regional Arrangement/Agreement are defined below. A regional arrangement should ideally be in the form of an agreement that can be signed by the countries in the Asia-Pacific region and to which they can become Parties. The general view is that too much pre-emptive focus on a binding nature of such a Regional Arrangement/Agreement is undesirable, thus highlighting the fact that a decision on the degree of its binding is better left to the member States of ESCAP. In any case, the Regional Arrangement/Agreement should also provide an institutional framework to ensure its smooth implementation and operation.

This chapter first deals with the possible contents and features of a proposed regional arrangement/agreement and then proceeds to deal with the institutional framework for its implementation and support. In working out the parameters of the proposed Regional

Arrangement/Agreement, this study relied on an earlier draft Agreement prepared by a group of experts under the aegis of UNNEXT.

### **A. Preamble to the Regional Arrangement/Agreement**

The Preamble to the proposed Regional Arrangement/Agreement closely follows the contents of the introductory portion of ESCAP Resolution 68/3, as the text has already been agreed upon and accepted by the member States.

### **B. Scope and objective**

The proposed Regional Arrangement/Agreement should clearly specify its scope and objectives for facilitating cross-border paperless trade for the Asia-Pacific region. It should be in a format aligned with other ESCAP Arrangement/Agreements. It should be noted that participation is purely voluntary; its scope is applicable only to those Contracting Parties who are voluntarily participating in the Arrangement/Agreement.

### **C. Provision for servicing and implementing the Arrangement/Agreement**

The Regional Arrangement/Agreement should also provide for an institutional arrangement to service and oversee its implementation. A three-tier organizational mechanism is therefore proposed with a common secretariat for proper and effective implementation, maintenance and expansion of the proposed Regional Arrangement/Agreement is recommended in this study.

#### **1. Governing body**

This study recommends that ESCAP establish a Cross-Border Paperless Trade Council as the governing body for the overall management of the proposed Regional Arrangement/Agreement. To ensure proper representation of the contracting member States at the decision-making level, it is recommended that the Council comprise one ministerial-level nominee from each contracting State as well as the Executive Secretary of ESCAP. The Council may meet once every two years. By having a biennial meeting

arrangement, the Council can avoid the burden of convening frequently for the contracting States and can coordinate its decisions with the competent legislative body of the ESCAP Committee on Trade and Investment, which meets biennially.

## **2. Implementing (or supervisory) body**

The Council will function as a governing body for making decisions. In the performance of its mandated functions, the Council will need support from a working-level body, which can meet more frequently and address specific issues in more detail. This study recommends establishing a Standing Committee for providing support to the Council. The Standing Committee would supervise and coordinate the implementation of the proposed Regional Arrangement/Agreement, and would submit its recommendations to the Council for review and decision. It is recommended that the Standing Committee comprise representatives of relevant government agencies and/or national Paperless Trade Committees of the contracting States, and that it meets at least once a year.

This study recommends that the Standing Committee, under the supervision of the Council, be mandated to develop and implement a comprehensive Action Plan. Such an Action Plan should set out all necessary specific actions and measures with clear targets and the timelines necessary for creating a consistent, transparent and predictable environment for the implementation of the proposed Regional Arrangement/Agreement. The action plan should also include a roadmap for the implementation of global standards as well as the pilot projects initiative specified in the proposed Regional Arrangement/Agreement.

## **3. Supportive body**

In the implementation of the proposed Regional Arrangement/Agreement, the Standing Committee may also need support from expert groups since it involves the implementation of technical and legal aspects. This study recommends that the Standing Committee be given the authority to establish working groups comprising relevant technical or legal experts to handle specific technical and legal matters. All working groups should report to the Standing Committee on the implementation of the Regional Arrangement/Agreement and the related Action Plan only in their mandated areas of expertise.

#### **4. Secretariat**

It is recommended that the ESCAP secretariat act as the secretariat for the implementation of the proposed Regional Arrangement/Agreement as well as for the bodies to be established under it. The secretariat should provide support in coordinating, reviewing and supervising the implementation of the proposed Regional Arrangement/Agreement.

The ESCAP secretariat has demonstrated its capacity to properly support the proposed Regional Arrangement/Agreement through its proven record of successful support for other multiple regional arrangement/agreements, such as APTA, the Intergovernmental Agreement on the Asian Highway and the Intergovernmental Agreement on the Trans-Asian Railway Network.

The ESCAP secretariat also has in-house expertise and knowledge accumulated by its staff over an extended period of work experience. It also has a regional network of experts on paperless trade (the United Nations Network of Experts for Paperless Trade in Asia and the Pacific), which can provide high-quality support in the substance and capacity-building components of the proposed Regional Arrangement/Agreement. Furthermore, the ESCAP secretariat maintains strong partnerships with relevant international and regional organizations, including UNCITRAL, WCO, the World Bank, UNECE, WTO, ASEAN, APEC and ADB.

#### **D. Definitions and appropriate terminology**

It will be useful to provide definitions of important terminology used in the Regional Arrangement/Agreement such as “mutual recognition”, ”Single Window”, “Trade Document”, “Commercial Transactions” etc.

It is also suggested that the term “paperless trade” be used in the Regional Arrangement/Agreement instead of “E-trade”, as the latter can be misunderstood as meaning only what can be traded electronically, such as shares, bonds, foreign exchange, music, software etc. The term “paperless trade” makes it clear the Regional

Arrangement/Agreement includes goods that are physically traded without exchanging paper documents.

### **E. General principles**

The Regional Arrangement/Agreement should have a separate Article containing the general principles that will guide the Regional Arrangement/Agreement and its implementation. Suggested general principles for inclusion would be related to technological neutrality, functional equivalence, non-discrimination, functional interoperability etc.

### **F. National committees and national policy framework**

It is proposed that provisions be included that allow recommendation of the establishment of national Paperless Trade Committees and a national policy framework in those countries that will become Parties to the Regional Arrangement/Agreement.

### **G. Single Window system**

As stated above, while the development of a national Single Window is highly desirable to ensure a more effective cross-border paperless trade, the ground reality is that many countries in the Asia-Pacific region do not have such a system at present. Insisting on a Single Window system as a prerequisite may not be the most desirable way to move forward. Moreover, since it is possible to move on to a paperless trading arrangement without a country having a complete Single Window system, the inclusion of a flexible provision in the Regional Arrangement/Agreement is proposed.

### **H. Technological framework**

The Regional Arrangement/Agreement should contain general provisions regarding the technical platform/systems framework that member countries can adopt from among the various options that are available. However, Regional Arrangement/Agreement should

also contain specific provisions that will ensure the capability to interconnect/intercommunicate and to prevent illegal intrusions.

Many countries have adopted automated customs procedures, which are at different levels of development. In some cases, the datasets used are country-specific and, in some instances, international standards have been followed. Some countries have implemented Single Window systems while others have advanced further to the stage of introducing cross-border transfers of trade data electronically, either bilaterally or with a group of countries.

With the technological advancements that are constantly taking place, it now appears possible to exchange trade data electronically, using either the UN/EDIFACT standard or the XML standard. XML messages have larger file sizes but are more flexible and easier to read. XML also appears to involve low set-up costs and is, therefore, preferred by small businesses. On account of early adoption, Europe reportedly has a large EDIFACT-installed base, whereas the XML standard is more widely used in Asia.

Harmonization of data will greatly facilitate data exchange among different entities, especially cross-border exchanges. However, the absence of harmonization does not present an insurmountable obstacle to making such exchanges. It is technologically possible to use specialized software for mapping data exchanges that apply global standards (such as EDIFACT or XML) and data that are recorded in the format of existing legacy systems. Appropriate conversion software makes cross-border electronic exchanges of trade-related data much easier than was previously thought as it would not require the replacement of legacy systems currently in use.

The Regional Arrangement/Agreement need not specify the trade documents/data elements that would be exchanged across borders. It is recognized that the number of data elements captured while allowing exports from a country is usually less than the number of data elements required by the importing country for clearing an import consignment. It would be best initially to let the member countries decide on the data elements to be

exchanged. However, as the secretariat for the implementation of the proposed Regional Arrangement/Agreement as well as for the bodies established under it, the ESCAP secretariat should be notified of any such decision. In due course, it may then be possible to compile and arrive at a standard set of data elements for exchange. Incidentally, as pointed out above, discussions in WCO also favour exchanges of groups of data elements through UBs related to specific parts of business processes.

It would therefore be desirable that, while operating under the Regional Arrangement/Agreement, trading partner countries agree upon which standard they will use for electronic exchange of data and which data elements will be exchanged between them. They should also be required to inform the ESCAP secretariat of their choice of standard and data elements.

There is also a need to assign a unique identification number to each consignment, not only for tracking purposes but also for correlating the electronically-transmitted data to the consignment. In this regard, it will be useful for the Regional Arrangement/Agreement to require implementation of a global standard.

Each country may have to provide a gateway to receive and transfer data rather than put its main system online, in order to guard against possible attempts at hacking from across the border or from within the country. Ideally, each country should also have business continuity servers and disaster-recovery systems in addition to the online servers and gateways. However, the Regional Arrangement/Agreement need not be specific about such requirements, leaving the choice to the countries concerned.

Cross-border transmission of data should be accompanied by appropriate security measures, such as a digital signature, to ensure that the trade data communicated are authentic; this will enable the same data to be used for clearance of goods.



## I. Legal framework

The Regional Arrangement/Agreement should contain provisions for creating an enabling domestic legal environment, legal recognition of electronic documents received from across the border and for digital signatures. It should also provide for the adoption of the UNCITRAL Convention on the Use of Electronic Communication in International Contracts. In addition, the Regional Arrangement/Agreement needs to provide for privacy, data protection and protection of intellectual property rights as well as a legal liability framework. A list of the guidelines recommended for creating a legally enabling environment at the domestic level is given in box 5):

### **Box 5: Readiness of e-CO implementation in cross-border trade in the APEC region**

1. Contracting Parties shall (undertake/endeavour) to create an appropriate legal and regulatory framework for paperless trade including, but not limited to, laws on electronic submission of documents, electronic signatures including digital signatures, user and message authentication, and electronic evidence regulation governing admissibility of electronic information in domestic courts.
2. Contracting Parties shall (undertake/endeavour) to implement legislation in order to address the security of data collection, sharing and amendment as well as data accessibility, retention, archiving and destruction methods. The legal provisions should include measures to ensure that an “audit trail” is established for electronic information so that liability and responsibility issues can be addressed ex post, and which should adhere to international standards where possible.
3. Contracting Parties shall (undertake/endeavour) to enact legislation concerning liability and indemnity, enforcement and dispute resolution. In order to avoid lengthy judicial proceedings, the Contracting Parties are encouraged to consider Alternative Dispute Resolution (ADR) provisions as a means of facilitating paperless trade-related dispute resolution.
4. Contracting Parties shall (undertake/endeavour) to enact laws addressing data protection and issues of privacy (e.g., personal data protection) as well as the protection of proprietary company data and confidential trade-related data.
5. Contracting Parties shall (undertake/endeavour) to provide legislation empowering government agencies to share trade-related data and documents among the relevant agencies in order to form a foundation for paperless exchanges of information and

cross-border interoperability. This should be done in a manner consistent with the privacy provision above.

6. Governments or national Paperless Trade Committees shall (undertake/endeavour) to commit to the protection of traders and citizens through the implementation of legal structures that provide for control of service fees and service quality of paperless trade-related service providers.
7. Promotion of competition, to the extent possible, may be encouraged by emphasizing transparency and neutrality.

A team of legal experts could be created by the ESCAP secretariat on the basis of UNNExT expertise, which on request may conduct a legal gap analysis for any member country and provide assistance in framing suitable laws for such member countries.

### **J. Dispute resolution**

It will be useful to provide a mechanism for resolution of disputes that may arise between the Parties to the Regional Arrangement/Agreement in the course of its implementation. Similar provisions existing in other Arrangement/Agreements may be used with suitable modifications.

### **K. Adoption of international standards**

The Regional Arrangement/Agreement should also provide for the adoption of international standards and instruments in its Annexes in order to ensure mutual recognition and interoperability. The initial relevant international standards and instruments for consideration by ESCAP members are listed in box 6.

### **Box 6: Relevant international standards and instruments**

- United Nations Convention on the Use of Electronic Communications in International Contracts (2007)
- The UNCITRAL Model Law on Electronic Commerce (1996)
- The UNCITRAL Model Law on Electronic Signatures (2001)
- OECD Recommendation on Electronic Authentication and OECD Guidance for Electronic Authentication (2007)
- WTO Arrangement/Agreement
- Revised Kyoto Convention on Simplification and Harmonization of Customs procedures
- World Customs Organization Harmonized Dataset
- WCO Recommendation on the Dematerialization of Supporting Documents (2012)
- OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data (1980)
- OECD Recommendation on Electronic Authentication and OECD Guidance for Electronic Authentication (2007)
- APEC Cross-Border Privacy Enforcement Arrangement (CPEA) (2009)
- Berne Convention for the Protection of Literary and Artistic Works (1886)
- Paris Convention for the Protection of Industrial Property (1883)
- WIPO Patent Law Treaty (2000)
- WTO Arrangement/ Agreement on TRIPS
- UNCITRAL Arbitration Rules (1976)
- UNCITRAL Model Law on International Commercial Arbitration (1985, amended in 2006)
- UNCITRAL Model Law on International Commercial Conciliation (2002)
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "New York" Convention).

### **L. Amendment and interpretation of the Regional Arrangement/Agreement**

Provisions are required to be made for amendments to the Regional Arrangement/Agreement, including its Annexes, in order to take into account any major technological or other change. Similarly, provisions need to be made for interpretation of the Regional Arrangement/Agreement in the event of a dispute or doubt. It may also be useful to include a provision for final dissolution of the Regional Arrangement/Agreement that can be used in the event of a wider global arrangement with identical coverage

coming into force in the future. However, there does not appear to be any need to provide for any reservation concerning any part of the Regional Arrangement/Agreement.

### **M. Capacity-building**

The Regional Arrangement/Agreement must also provide capacity-building support to developing countries, especially those with special needs such as least developed countries, landlocked developing countries and small island developing countries..

It may also include a provision for inviting technical and financial assistance from development partners, such as ADB and the World Bank, for more effective capacity-building support to developing countries.

### **N. Entry into force and timeline for implementation**

Ideally, a Regional Arrangement/Agreement should provide a time limit for the implementation of its provisions after it enters into force. The proposed Regional Arrangement/Agreement provides that it shall enter into force on the ninetieth day after at least eight member States have signed it. In the case of member States who sign the proposed Regional Arrangement/Agreement later, it will come into force on the ninetieth day after the respective date of their signing. Eight member States and the 90-day period have been adopted from other existing ESCAP regional agreements for the purpose of consistency; however, this may be changed if necessary.

The more important question is whether the proposed Regional Arrangement/Agreement should specify a time limit from the respective date of entry into force for implementation that requires the contracting State to create an enabling legal environment and make arrangements for cross-border paperless exchange of trade-related data to begin within that time. While deciding on the time limit, several factors have to be considered, including availability of finances, manpower and technology. Apart from allocating the required resources, when developing a Single Window system the time needed to persuade various government departments to form a single platform can be considerable. The proposed

Regional Arrangement/Agreement provides a flexible approach in regard to the Single Window system, and advances in ICT can reduce the cost and time involved in implementation. Most important, of course, is the willingness of a member State to recognize the advantages of paperless trade and to implement the proposed Regional Arrangement/Agreement. This study recommends a period of five years for developing a Single Window system, but a longer period may be adopted if the member States so decide. Countries with special needs that require more capacity-building assistance may, in any case, approach the Council for an extension of the time limit.

On the basis of the above recommendations, a Draft Regional Arrangement/Agreement has been prepared and provided in annex 2 of the *Study on Regional Arrangements for Facilitation of Cross-border Paperless Trade in Asia and the Pacific* to this study (available at [www.unescap.org/tid/projects/bpatf-report.pdf](http://www.unescap.org/tid/projects/bpatf-report.pdf)). Care has been taken to ensure that the proposed Regional Arrangement/Agreement is in consonance with global trends emerging from the discussions in WTO and WCO. It will also be compatible with, and not disrupt any of the existing bilateral/regional arrangements for paperless exchange of trade-related data because the proposed Regional Arrangement/Agreement takes note of the ground realities and adopts a flexible approach. It does not require doing away with the existing systems in operation, but requires building on the same. A member State can participate in paperless trade whether it has a Single Window system or any other legacy system. A member State and its trading partner will also have the flexibility to mutually decide upon the data elements to be exchanged. Subsequently, more and more countries will opt for Single Window systems once they realize the greater advantage of such systems in the context of paperless trade. Similarly, the data elements to be exchanged will also increase in number and become standardized.

The need for, and the advantages of a regional arrangement for the Asia-Pacific region have already been discussed above. For obvious reasons, mere arrangements in the form of guidelines and recommendations would not be efficacious in ushering in paperless trade to the region. A flexible regional agreement would secure wider acceptance among countries in Asia and the Pacific, and would ensure the establishment of national Paperless Trade

Committees, create the necessary legal environment and the requisite IT infrastructure, preferably in a time-bound manner, for participation in cross-border paperless trade. Obligation under an international agreement often acts as a catalyst to speedier action, thus overcoming the lack of political will and administrative inertia. This report, therefore, strongly recommends adoption of the proposed Agreement in annex 3. Similarly, the *Study on Regional Arrangements for Facilitation of Cross-border Paperless Trade in Asia and the Pacific* strongly recommends the adoption of its proposed Agreement.

The draft text of the Agreement [Framework Agreement] on Facilitation of Cross-Border Paperless Trade for the Asia-Pacific Region, provided in annex 3 of this paper, is the outcome of extensive refinement work carried out on the basis of the draft regional Arrangement/Agreement proposed in the *Study on Regional Arrangements for Facilitation of Cross-border Paperless Trade in Asia and the Pacific*. Such refinement work included two expert group meetings as part of an expert review, three subregional (South-East Asia, South and South West Asia, and East and North-East Asia) meetings and one regional meeting as part of the member consultations.